SUPREME COURT, U. S.

679

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT-ARTHUR MANAGEMENT CORPORATION,
Appellant,

v.

STATE OF TENNESSEE EX REL. PHIL M. CANALE,
District Attorney General,
Appellee.

APPELLEE'S REPLY BRIEF.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

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OPINION BELOW.

This is an appeal from an opinion of the Supreme Court of Tennessee not yet officially reported, but unofficially reported in 414 S. W. 2d 638, and attached as Appendix A to the Jurisdictional Statement filed in this appeal.

JURISDICTION.

The appellee, State of Tennessee, concedes the jurisdiction of this Honorable Court in this cause by virtue of Sections 1257, 2101, and 2104, Title 28, U. S. C., as construed by this Court.

STATUTE INVOLVED.

The statute involved is Sections 39-3005—3007, Tennessee Code Annotated, as stated and set out by counsel for the appellant.

QUESTIONS PRESENTED.

Counsel for the appellant insists that seven questions are presented in this cause, however, in his conclusion the number of substantial federal questions has been reduced to four. Counsel for the appellee insists that the questions presented by the record can be properly re-stated as follows: (1) Whether or not the statute in question contravenes the First Amendment and the Due Process Clause of the Fourteenth Amendment, Constitution of the United States, on the grounds that it constitutes a prior restraint by authorizing an injunction against the showing of the film involved pursuant to an ex parte hearing; (2) Whether or not there was sufficient evidence in the record to warrant the finding of the trial judge that the film, Mondo Freudo, was obscene; (3) Whether or not the trial judge's final decision was based in part upon evidence heard by him at the ex parte preliminary hearing and sufficient to amount to a denial of due process; and (4) Whether or not the Tennessee statute is so vague and uncertain it fails to meet the requirements of due process.

STATEMENT OF THE CASE.

The statement of the case is as stated by counsel for the appellant and the questions presented were in substance as presented to the Tennessee Supreme Court.

THE EVIDENCE.

The evidence in this cause heard by the trial judge was summarized in a finding of fact which has been made a part of the Jurisdictional Statement as Appendix B.

The Supreme Court of Tennessee, in addition to considering the evidence in the record from the trial court,

also viewed the film and made a finding with respect to it, as follows:

> "We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific of artistic value and utterly without social importance."

Jurisdictional Statement, Appendix A, Pages 24-25.

ARGUMENT.

(1) The Tennessee statute is not substantially different from the New York statute on the same subject upheld by the United States Supreme Court in the case of **Kingsley Books v. Brown,** 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469. The procedure followed in the two cases are somewhat different in that a show cause order was issued in the **Kingsley** case and in the present case a show cause order was not issued, but there appears to be no reason why an injunction could not have issued in the **Kingsley** case without first having a show cause order. The Tennessee statute provides that when a temporary injunction is issued a trial must be held within two days after joinder of issue and a decision rendered by the Court within two days after the trial. The New York statute provides for a hearing within one day after joinder was issued in such cases and a decision within two days after the trial.

The New York Court four years after the decision in **Kingsley Books,** supra, was decided, held in **Tenney v. Liberty News Distributors,** 215 N. Y. S. 2d 663, that the New York statute did not authorize ex parte relief but postponed all injunctive relief until there had been an opportunity for an adversary type hearing. (The **Kingsley** case was decided in 1957 and the **Tenney** case in 1961.) This Court in **Quantity of Copies of Books v. State of Kansas,** 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809, decided in 1964, adopted the New York Court's construction of the statute and seemed to relate it back to the **Kingsley Books** case, supra.

An examination of the **Quantity of Copies of Books** case, supra, and the case of **Marcus v. Search Warrants,** 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, clearly reveals that the statutory procedure followed in those two cases

did not resemble the procedure provided for in the New York statute or the Tennessee statute now under consideration and that consequently, the holding in the **Quantity of Copies of Books** case is dicta (The Missouri statute considered in the **Marcus** case authorized a search for obscene materials, leaving the determination of what might be obscene to the discretion of the officer executing the search warrant. The Kansas statute considered in the case of **Quantity of Copies of Books** authorized the issuance of a search warrant for obscene materials only after a hearing before the issuing magistrate similar to that required by the New York and the Tennessee statute prior to issuing an injunction but allowed an elapse of ten days after seizure before an adversary type hearing could be had and there does not appear to be any requirement in the statute that a decision must be made by the judicial officer within any given time as is required in the New York statute and in the Tennessee statute).

It was observed by this Court in **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, that it was common knowledge that films are scheduled for exhibiting and showing well in advance so that a State statute requiring a submission of the film to a censoring agency might be valid because it would not interfere with the showing or exhibiting of the film. This, it is submitted, would not be different from an ex parte hearing authorized by the Tennessee statute and the New York statute provided the hearing was held at a time so that there would be no interference with the showing of the film.

It is not insisted on this appeal that the appellant had a desire to show the film in question, Mondo Freudo, during the period between the application for the injunction and the full, complete and adversary type hearing on the question before the trial judge. The record indicates to the contrary in that counsel for the appellant did not compel a hearing within the time authorized by the statute.

If states are forbidden to enact legislation requiring a hearing similar to that authorized by the New York statute and the Tennessee statute, restraint or control over the showing of films is rendered impossible. Owners of theaters could run a film for a week or two in one community and by the time the people in the community became aware and convinced of its obscenity, the film would be sent on to another community or city, rendering injunctive relief moot and society helpless to protect itself from abuse from those who would exploit the subject of sex commercially.

(2) The trial judge heard several witnesses who considered the film to be obscene and several witnesses to the contrary. In addition to that, he viewed the film. The Tennessee Supreme Court read the testimony of these witnesses and also viewed the film. Counsel for the appellee therefore insists that the assignment of error to the effect that there is no evidence to support the judgment of obscenity is without merit.

(3) The trial judge did hear evidence prior to issuance of the injunction. This appeal would indicate that what he heard was not of sufficient significance to warrant his finding that the film was obscene and his issuance of an injunction. However, in this assignment of error, it is insisted that he was prejudiced in his final judgment because of having seen evidence on the question prior to the hearing. If this assignment of error has merit, then it would seem to justify the ex parte hearing complained of in this cause. However, counsel for the appellee submits that the trial judge was not disqualified to render judgment in this cause because of his previous information regarding the film. Such a contention would not be different from insisting that a trial judge who overruled a demurrer would be disqualified from proceeding to try the case. Even if the trial judge were prejudiced, the Ten-

nessee Supreme Court was not so prejudiced because it did not have the advance information because no evidence was presented to it except the record on appeal which it considered de novo.

(4) In reply to the fourth assignment of error this Court in the case of **Mishkin v. New York**, 383 U. S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56, held that the New York statute was not too vague in order for the defendant to have notice what the statute denounced as obscene and the Tennessee statute in question is again very similar to the New York statute in this respect. Further the Tennessee statute defines obscene material as it is defined by this Court. Section 39-3007, Tennessee Code Annotated, is as follows:

> "39-3007. Definition of obscene material—The following definition shall control in construing §§ 39-3003-39-3008:
>
> "Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition, (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase 'predominant appeal' shall be considered with reference to ordinary persons. (Acts 1965, ch. 91, § 2; 1965, ch. 92, § 2; 1965, ch. 93, § 2.)"

CONCLUSION.

In view of the foregoing, the appellee insists that the appeal in this case should be dismissed and the judgment of the Tennessee Supreme Court be permitted to stand.

Respectfully submitted;

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I hereby certify that a copy of the above Appellee's Reply Brief has been forwarded to the Honorable Longstreet Heiskell, Attorney at Law, 2020 First National Bank Building, Memphis, Tennessee 38103, on this the 26 day of October, 1967.

Thomas E. Fox,
Deputy Attorney General.